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On rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROSTACK INVESTMENTS, INC., Plaintiff and Respondent, v. ANGELA C. SABELLA, Defendant and Appellant.	B260844, B265833 (Los Angeles County Super. Ct. No. BC428298)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara A. Meiers, Judge. Reversed with directions.

Miller Barondess, Louis R. Miller, A. Sasha Frid and Mira Hashmall; Gibson, Dunn & Crutcher, Theodore B. Olson, Julian W. Poon, Timothy Loose and Michael Holecek for Defendant and Appellant.

Mayer Brown, Neil M. Soltman, John Nadolenco and Christopher P. Murphy for Plaintiff and Respondent.

Multi-billionaire Hong Kong businessman Chen Din-Hwa (Chen) loaned his daughter, Angela C. Sabella (Angela) funds to purchase a Utah ranch. Angela and Chen always understood that Chen would either give Angela the money to repay the loan, or forgive the loan entirely. The main issue on appeal is whether there is a triable issue of fact as to whether Chen actually completed the gift of loan forgiveness prior to his death. As we conclude there is evidence of a completed gift, we reverse the summary judgment against Angela.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Family Dispute

The family consisted of Chen himself, his wife Chen Yang Foo Oi (Mrs. Chen), and their daughters Angela and Vivien Chen (Vivien). In some ways, this case is nothing more than Angela and Vivien fighting over their respective shares of Chen's considerable assets, with Mrs. Chen siding with Angela, and the executors of the Chen estate lining up behind Vivien, who is herself an executor.

That said, the family history is largely unnecessary to this appeal. Angela moved to America to pursue her education and, eventually, helped her father manage his U.S. investments. Vivien remained in Hong Kong and worked for her father's companies. One of Chen's companies, which we discuss further, was plaintiff and respondent Rostack Investments, Inc.

2. The Two Bear Ranch Loan

In 1995, Angela identified Two Bear Ranch in Utah as a potential investment property. Chen was interested.

There is no suggestion in the record that Angela had the funds (some $25 million) to purchase the property herself. It was decided that the money would come from Chen, and the transaction would be structured in a particular way for tax purposes. While the intricacies of Chen family tax planning are beyond the scope of this opinion, the evidence revealed three important facts about the structure of the transaction: (1) Angela, not Chen, was the actual buyer; the transaction would not have favorable tax consequences if Angela was simply a

puppet acting for Chen; (2) Chen would loan the money to Angela, not gift it; the loan enabled Angela to take substantial tax deductions for interest paid; and (3) Chen would not personally loan the funds to Angela, but would instead use one of his off-shore companies, Rostack, a Liberian corporation, as the lender.

As Chen's ability to unilaterally act for Rostack is at issue, we briefly discuss Rostack as a corporate entity. Most of Chen's companies were part of the Nan Fung group of companies, which Chen controlled. Rostack, however, was outside of Nan Fung. All of Rostack's stock was owned by a corporation called Sai Wo, which, itself, was 100 percent owned by Chen. During the relevant time period, Rostack had two directors, both of whom otherwise worked for Nan Fung. Rostack had no officers or employees. Instead, Rostack relied on Nan Fung employees for accounting and other services. Rostack had no offices. It had been established for the purpose of making loans outside of Hong Kong. It had no business operations other than to accommodate Chen's investments.[1] Rostack's directors would take no action without Chen's approval; Chen did not consult with them before directing Rostack's actions. At best, Chen had the final say in Rostack's decisionmaking; at worst, Rostack was "100 [percent] . . . controlled by" Chen, "had no capital of its own and was entirely dependent on funds" from Chen.

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[1] Based on her own declaration, Angela proposed this as a material fact in opposition to Rostack's eventual motion for summary judgment. In addition to objecting to Angela's declaration (no objections are pursued on appeal), Rostack disputed the fact, stating only that Rostack had engaged in seven direct loan transactions and been involved in loan participation agreements relating to eleven loans. At no point, however, did Rostack offer evidence that any of its loan business was unrelated to Chen's investments.

Chen supplied the funds for Rostack to loan to Angela. He loaned the money to Sai Wo, which loaned the money to Rostack.[2] The record is silent as to the terms of the loan between Sai Wo and Rostack, and what ultimately happened to that loan.

Rostack then loaned the funds to Angela via a $30 million line of credit, with annual interest payments due of 10 percent of the outstanding balance. Angela signed a promissory note memorializing the transaction. The note contained a California choice of law clause, as well as the parties' consent to jurisdiction in California courts.

While the parties may disagree over the precise amount due, it is undisputed that Angela made several withdrawals from the line of credit, and made some principal and interest payments. It is also undisputed that every payment Angela made to Rostack was, in fact, funded by Chen. For ten years, Chen regularly gave Angela annual gifts to make the interest payments to Rostack. He also gave her funds to repay some of the principal.

3. The Loan Forgiveness

Chen was diagnosed with Alzheimer's disease in 1995. His memory function deteriorated more rapidly than other cognitive functions; his treating physician declared that Chen's memory began to be severely impaired as early as 2000.

Perhaps in recognition of his increasing mental limitations, Chen and his family began discussions regarding the allocation of his assets. On July 18, 2003, Chen discussed assets to be gifted to each of his daughters. They prepared a table, handwritten by Vivien (in Chinese) listing cash and properties to be given to Angela and Vivien. The column for Angela includes the following: "The Two Bear Ranch loan be gifted to [Angela] and [three houses] be gifted to [Angela]." The corresponding entry in Vivien's column reads, "[Vivien] cannot ask Father equally to gift

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[2] Some of the funds were transferred through several other companies as well. It is not disputed, however, that the funds were to be recorded as a loan from Sai Wo to Rostack.

[Vivien] the same value as the 3[ ]US residences and the Two Bear loan gifted to [Angela]."[3] Angela and Vivien both signed this document. We refer to this as the "July 2003 chart."

On July 31, 2003, another document was prepared, entitled "Asset Distribution." This typed document was unsigned by anyone in the family, although it was prepared for the signatures of Chen, Angela and Vivien. It sets forth, in chart form, distributions to Mrs. Chen, Angela and Vivien. Following the distribution, it states, "In addition to the above, . . . Chen will give [Angela] other gifts. The total of the gifts, according to [Angela], is worth approximately US$34 Million (approximately [HK]$265 Million); they include the three residential houses . . . in Los Angeles and the current balance of the loan [Angela] owes to Rostack Investments Inc. (a subsidiary . . .) relating to the Two Bear Ranch in Salt Lake City, Utah. The gifts are not part of the asset distribution [above] for each person, and Mrs. Chen and [Vivien] will not receive any gifts equivalent to the HK$265 Million."

Although these documents unquestionably indicate that Chen all along intended to gift or forgive the loan to Angela, he did not effect that intent by the July 2003 chart, nor had he done so by February 2005. On February 7, 2005, Angela, or someone on her behalf, prepared a written proposal asking Chen to give Angela the funds to retire the loan. It stated, "[Chen] had agreed to gift the loan of US$30 million in respect of the captioned Two Bear Ranch to Angela Chen and would not be counted into the total asset value that [Chen] gifted to Angela Chen, [Chen] please personally gift[] approximately US$30 million to Angela Chen or her trust, Angela Chen will within 7 days repay the whole sum to [Chen's] beneficiary [*sic*] owned company ROSTACK, as full[] repayment of the above-mentioned loan." Vivien was requested to comment on this proposal; she wrote, "At father's pleasure

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[3] The explanation for this apparent inequality in distribution was that, according to Angela, Vivien had already received from Chen a gift of real estate comparable in value.

whether to gift an additional $30 million to Angela Chen, Vivien Chen will not oppose. Especially Angela . . . said Father had agreed to gift it to her years ago." We call this the "February 2005 proposal." Certainly by this time it was clear that Chen did not expect Angela to independently pay off the loan, a fact that Rostack does not dispute.

Chen did not approve the February 2005 proposal. Instead, the next day (February 8, 2005), Chen interlineated some language into the original July 2003 chart. We refer to this as the "February 8, 2005 modification." In Angela's column, where Vivien had originally written "The Two Bear Ranch loan be gifted to [Angela], and the [three houses] be gifted to [Angela]," Chen handwrote in Chinese, "[Angela] got 34m. US$." The amount noted was, by agreement, the value of the loan and the residences. Mrs. Chen, Vivien, and Angela were all present when Chen wrote this. According to Mrs. Chen's declaration, "As far as all of us were concerned, the gift was made." She further explained that, given Chen's deteriorated condition at the time, "he would not write something out unless he was resolute in stating his instructions for his staff to implement, and also to be reminded of it. At the time, I had seen that he had difficulty signing his name on his own without being shown his previous signatures from which he copied. The fact that he wrote the words, '*Wai Fong* [Angela] *got US$34 million*' in front of both daughters, unaided and uninfluenced, was, I believe, not an easy effort for him and it clearly showed his determination to express unequivocal instruction to the staff, and endorsement to the family agreement, that the Two Bear Ranch loan was gifted to Angela."

There is some evidence that the family did not treat the loan as having been gifted or forgiven at this time. For example, Chen gave Angela funds for two additional interest payments, which she made in 2005 and 2006. It also appears that on March 18, 2005, Chen directed an employee, Alan Chan, to write a short note that was attached to the unsigned February 2005 proposal. That note read, "[Chen] has already stated to [Angela] that he

had already gifted a lot (a substantial portion) of U.S. assets to [Angela], therefore the Salt Lake City Two Bear Ranch would not be gifted, would be left to [Chen] himself. ([Angela] said [Chen] had previously said to gift this ranch)[.]"[4] At deposition, Alan Chan testified that he believed the gift had already been made on February 8, 2005 (the date of the modification), and that, by the time of this note, Chen's memory had deteriorated to the point where he forgot that he had already made the gift.

4. Further Events

In 2005, Angela started to believe that Vivien was taking advantage of her father's condition in order to take control of Chen's businesses. Angela moved back to Hong Kong to take care of her parents.

For whatever reason Angela stopped paying interest on the note after 2006.

In 2008, Angela successfully brought a proceeding in Hong Kong to have her father declared a mentally incompetent person. A court-appointed outside individual was placed in control of his affairs. According to Angela that individual did not sit on the board of Chen's companies, and instead management of those companies remained with Vivien. Chen died in June 2012.

5. The Complaint

On May 25, 2009, after the Hong Kong court had found Chen incompetent, Rostack's counsel wrote Angela, declaring her in default on the note for failing to pay interest, and demanding payment in full. On December 18, 2009, Rostack brought this action against Angela, alleging causes of action for breach of contract, book account, and money lent. Angela believed that Rostack's then-current directors would not have brought suit without the approval of Vivien, and believed this action was

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[4] We here note one obvious point: Chen never owned the ranch itself; he owned the note, through Rostack. Chen's reference to the ranch meant either that Chen referred to the ranch and the note interchangeably or that Chen was, by this time, confused as to the nature of his holdings.

Vivien's retaliation for the mental health proceedings Angela had brought against their father.

The case then began what can only be described as a lengthy and convoluted procedural course. We reduce several years of no-holds-barred litigation to its key events.

6. Summary Judgment is Denied

Rostack initially moved for summary judgment, arguing that it was undisputed that Angela had failed to pay on the note and that her affirmative defenses were meritless. However, before the hearing on its motion, Rostack filed a first amended complaint. The trial court concluded the first amended complaint mooted out the pending summary judgment motion. Two weeks later, Rostack moved for summary judgment again, although Angela had not yet filed an answer to the operative complaint. Recognizing this, Rostack made an educated guess as to what Angela's affirmative defenses would be, based on her prior answer and discovery responses. Among other things, Rostack suspected that Angela would argue that the February 8, 2005 modification of the July 2003 chart constituted a gift of the loan. Rostack argued that the modification was not binding on Chen or Rostack because "there is no signature from Mr. Chen in 2005 signifying or acknowledging his agreement" to it.

Angela then filed an answer to the first amended complaint, in which she did not include "gift" as an affirmative defense, followed by a first amended answer, in which she did. Angela specifically alleged, "In February 2005, Mr. Chen gifted Two Bear Ranch to defendant thereby forgiving, canceling and/or discharging the Promissory Note, on behalf of himself and Rostack, a company he owned and controlled. Both Defendant and Vivien agreed, acknowledged and signed off on the gift. As such, the Note is not a legally enforceable obligation." In opposition to the summary judgment motion, Angela specifically argued that the gift was confirmed by Chen by means of the February 8, 2005 modification.

In reply, Rostack argued that the loan was not gifted because a gift requires delivery, and Chen's interlineations on the

document were not sufficient to constitute delivery under the law. Rostack also relied on evidence that Angela subsequently acted as though the loan had not been gifted on February 8, 2005, by making subsequent payments.

The motion was heard before Judge Luis Lavin. At the hearing, Judge Lavin focused argument on whether there was a triable issue of fact of delivery, specifically by the February 8, 2005 modification. While the court recognized there was evidence to the contrary that Angela would have to overcome at trial, there was sufficient evidence to defeat summary judgment. On April 5, 2012, Judge Lavin entered an order denying summary judgment. He concluded that Rostack had met its initial burden of proof of breach of contract, but that, in response, Angela had raised a triable issue of fact of gift.

7. The Case is Reassigned

On June 1, 2012, the case was reassigned from Judge Lavin to Judge Barbara Meiers. At around this time, Chen passed away.

On September 25, 2012, at a hearing on a motion to reopen discovery, Judge Meiers asked about the progress of the probate of Chen's estate in Hong Kong. Once the parties conceded that Rostack had been, in effect, 100 percent owned by Chen, the court noted that Rostack was now beneficially owned by Chen's estate, and it was certainly possible that the executor of the estate might want to put new directors in charge of Rostack who would not wish to pursue this action. Rostack eventually responded to the court's concerns by obtaining a letter from counsel for the executors of Chen's estate. There were four executors, including Vivien, and they were happy for Rostack to continue to pursue the case. A subsequent letter clarified that although Vivien was an executor, she had not participated in any decisions pertaining to the pending lawsuit and had instead abided by the decisions of the remaining executors.

8. Briefing on Indispensable Party

At a hearing on another unrelated motion, Judge Meiers raised the issue of whether the estate was an indispensable party to this litigation, and sought additional briefing on the matter.

Angela believed the estate was an indispensable party and that the case must be dismissed because Rostack had no standing. She took the position that Rostack was simply a shell acting for Chen, who had been the real party in interest all along. As it had been Chen's money (passed through Rostack) that was loaned to Angela, it was Chen, not Rostack, which could pursue her on the debt, if anyone could.

Rostack, on the other hand, believed that the estate was not an indispensable party to a resolution of its complaint. Rostack argued that it was a legitimate legal entity that could pursue the debt – and that the death of the shareholder of its parent corporation had no effect on Rostack's ability to do so. Nevertheless, Rostack argued that the estate was indispensable to resolution of Angela's affirmative defense of gift. Rostack recharacterized Angela's gift defense *not* as an argument that Chen, acting for Rostack, had forgiven the loan, but as an argument that Chen, acting for himself, had promised to pay off the loan.

9. Judge Meiers Reopens Summary Judgment

At the next hearing, which was primarily on another discovery motion, prior to any ruling on indispensable party, Judge Meiers on her own strongly suggested that Judge Lavin erred in denying the prior summary judgment motion. She was concerned that, as to the gift defense, there was only evidence of intent, but no evidence of delivery, even though Judge Lavin had found a triable issue of fact on delivery as well.[5]

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[5] Among other things, the court stated, "And so if Judge Lavin is still on the case, and he was of the view that he had erred, he could always reopen to correct the ruling. Now, you've got a different judge on the case who feels at least tentatively because I didn't go through the specific papers, maybe they were

Ten days later, the court filed an order inviting both parties "regardless of all prior rulings on summary judgment and/or summary adjudication issues, to file or refile such motions, augmented if appropriate with additional material developed since any earlier filings."

10. Indispensable Party and Reopening Summary Judgment Collide

The court eventually requested substantial additional briefing, and held further hearings, on both the indispensable party issues and whether leave should be granted to permit Rostack to file a new summary judgment motion. Eventually, the court reached the following conclusions: (1) the issue of whether Rostack has standing to pursue the note is an issue to be resolved by a further summary judgment motion; and (2) whether Rostack has standing or not, Angela could not pursue her gift defense in this action. The analysis which led the court to this latter conclusion went as follows. If Rostack had no standing, the entire case was over. But if Rostack did have standing, Angela's defense that Chen had promised forgiveness was irrelevant, because it was Rostack, not Chen, which would have been required to forgive the loan. The court was adamant that gift was out of the case: when Rostack asked if it should brief the gift defense in the new summary judgment motion, the court said, "No. You're not getting into gift in the summary judgment."

We emphasize that, according to Judge Meiers, she had concluded that the parties could not brief the gift defense in the new motion for summary judgment not because Judge Lavin had already decided a triable issue of fact existed as to gift, but

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very inadequate, but the only reason he gave is what I've articulated, and that was the reason I would not rule that way, and I don't think we should be fooling around with this case anymore, tentatively, in light of the other things we now have."

because she believed the gift defense implicated the Chen estate, which was not a party to this litigation.[6]

11. Judge Meiers Grants Summary Judgment

As a practical matter, Judge Meiers's ruling preventing the parties from briefing gift on summary judgment was the end of Angela's case. The parties did end up briefing gift anyway, but, at the hearing on the motion, the court was unwavering in its belief that gift was no longer in the case.

The court ultimately entered two orders, one finding Chen's estate to be an indispensable party, and the other granting summary judgment.[7]

The indispensable party order concluded that the gift issue could not be reached because "Chen personally would have had no ability in all events to make a personal gift of this corporate obligation. Rostack could; but no such gift by Rostack or by Mr.

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[6] Chen's will contained an incontestability clause, which apparently disinherits anyone who challenges the will or the estate's administration. Given that Angela stands to inherit far more under the will than the amount at issue in this case, Angela made it clear that she would never attempt to pursue the gift issue against the estate.

[7] The court proceeded by issuing a written tentative ruling granting summary judgment and then asking the parties "to specify every fact that I have put in there that you think has not been supported by admissible evidence." The court also requested Rostack to "tell me where to find the admissible evidence" supporting the facts on which the tentative relied. The court chose this procedure due to what the court believed were "piles" of evidentiary objections to evidence that was immaterial, and the court was not "inclined to pile through all of that with a zillion rulings with both sides on materials that are totally unnecessary." The parties were asked for their input, and agreed with the court's proposed methodology.

Chen through corporate acts by Rostack has ever been demonstrated or claimed in this case."

The summary judgment order began with a finding that Rostack had standing and was, in fact, the entity that loaned Angela the funds. Rostack had not merely acted as Chen's agent. Moreover, Angela was obligated to Rostack on the loan, and it was undisputed that interest had not been paid since 2006. Angela's only real defense was gift, but the court had already removed the issue of gift from the case in its indispensable party ruling.

In any event, the court noted, "even were the 'gift issue' not to be out of the case due to the indispensable party doctrine, and assuming for the sake of argument that were the case, this court would still find (and does find) all of defendant's 'gift from Mr. Chen' arguments to be 'out of the case' and irrelevant in light of the court's finding reflected herein that the loan made was a loan from the corporation Rostack and not individually from Mr. Chen. That being the case, there is no need to reach any issue as to whether or not Mr. Chen made a gift or 'intended to' on its merits. Mr. Chen, acting on and in personal transactions, would have no ability or right to portend [*sic*] to give away the Rostack loan obligation for it was not his to personally give or forgive. The defense has never argued, much less submitted any evidence whatsoever that Rostack ever waived, made a 'gift' or in any other way gave away or compromised its right to repayment under the note. What defendant would need under the circumstances of this case would be a documented forgiveness of the loan by Rostack (for example, by a surrender of the promissory note by Rostack to [Angela] or a Board action by Rostack, or other form of release or book entry) which has never been proffered in any form by the defendant. Had it been, a gift by Rostack issue might well be before the court."[8] (Emphasis omitted.)

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[8] In neither ruling did the court appear to recognize that Angela's gift defense was as she had pleaded in her amended

12. Judgment, Attorney's Fees and Appeal

The court entered judgment for Rostack in the amount of $51,906,128.62. The note contained an attorney's fee clause; Rostack was subsequently awarded $6,587,446.22 in attorney's fees. Angela filed timely notices of appeal from the judgment and the post-judgment award of fees. We ordered the matters consolidated for oral argument and decision.

DISCUSSION

1. Introduction

On appeal, Angela argues the trial court erred in its indispensable party ruling and in essentially overruling Judge Lavin's initial summary judgment denial. But Angela is treating these as two separate rulings; we conclude they are more properly viewed as part of a single erroneous approach to the case.

Angela pleaded an affirmative defense of gift. The language of her affirmative defense stated: "In February 2005, Mr. Chen gifted Two Bear Ranch to defendant thereby forgiving, canceling and/or discharging the Promissory Note, *on behalf of himself and Rostack*, a company he owned and controlled. Both Defendant and Vivien agreed, acknowledged and signed off on the gift. As such, the Note is not a legally enforceable obligation." (Italics added.) To the extent the court concluded Angela had not pleaded a gift by Rostack, the court was simply mistaken. To the extent the court believed the record did not support a gift by Rostack, the issue should have been resolved by trial or, if feasible, summary judgment. There is no legal authority for the court to conclude, in the course of an indispensable party ruling on its own motion, that the facts do not support a properly pleaded affirmative defense. Reversal is therefore necessary on that basis alone.

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answer, that Chen had gifted the Two Bear Ranch property and discharged the note "on behalf of himself and Rostack."

2. Summary Judgment Procedure

"The policy underlying motions for summary judgment and summary adjudication of issues is to ' "promote and protect the administration of justice, and to expedite litigation by the elimination of needless trials." ' " (*Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 323.)

"A party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc., § 437c, subd. (a).) The motion and the opposition to the motion "shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Id.*, subd. (b)(1).) Separate statements setting forth plainly and concisely all material facts which the parties contend are undisputed must be included. (*Ibid.*) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence . . . and all inferences reasonably deducible from the evidence, except summary judgment may not be granted . . . on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (*Id.*, subd. (c); *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1028.)

A plaintiff has met its burden upon a motion for summary judgment or summary adjudication if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. The plaintiff need not disprove any affirmative defense asserted by the defendant; it need only prove each element of the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

Once the plaintiff has met that burden, the burden shifts to the opposition to show a triable issue of fact exists as the cause of

action. The defendant may do so by showing a triable issue of fact exists as to a defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(1).) In opposing the motion, the defendant may not simply rely upon allegations or denials of the pleadings; the defendant must set forth specific facts showing that a triable issue of material fact exists. (*Ibid.*)

On appeal, we exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.) We "construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19; accord, *Lorenzen-Hughes v. MacElhenny, Levy & Co.* (1994) 24 Cal.App.4th 1684, 1686-1687.)

Had resolution of the gift affirmative defense proceeded by summary judgment, instead of in the context of whether the estate was an indispensable party, Angela would have had the opportunity to defeat Rostack's motion by raising a triable issue of fact that Chen had forgiven the loan on behalf of Rostack. Had the court granted summary judgment, we would, on appeal, consider de novo whether Angela had raised a triable issue of fact. We cannot do this; the court never gave Angela the opportunity to defeat Rostack's motion for summary judgment by raising a triable issue of fact of gift. Instead, the court simply concluded, in the context of whether the Chen estate was an indispensable party, that Angela had no evidence that Chen officially acted for Rostack when he purported to forgive the loan. The court's failure to allow the issue to proceed on summary judgment and instead conclude on its own motion that Angela had not proffered sufficient evidence of forgiveness by Rostack requires reversal.

3. It is at Least Doubtful Whether the Court Could Have Reconsidered Whether a Triable Issue of Fact Existed on the Gift Affirmative Defense

On appeal, Angela argues that the court erred in inviting a second summary judgment motion after Judge Lavin had earlier denied summary judgment. We need not reach the issue. Although Judge Meiers did, in fact, expressly invite Rostack to refile its motion for summary judgment notwithstanding Judge Lavin's earlier ruling, Judge Meiers ultimately did not rule on the gift defense as part of the refiled motion; she disposed of the gift defense earlier without allowing the parties to re-brief and re-argue the issue on summary judgment.

We note, however, that the issue of whether Rostack *could have* pursued a second motion for summary judgment after Judge Lavin had already denied Rostack's motion for summary judgment on the gift defense implicates an important rule: one trial judge may not reverse another. It goes without saying that because Judge Lavin found a triable issue of fact of both intent and delivery, a second judge could not overrule that determination. As we explained in *In re Alberto* (2002) 102 Cal.App.4th 421, 427, "For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court." We further explained, "the power of one judge to vacate an order made by another judge is limited. [Citation.] This principle is founded on the inherent difference between a judge and a court and is designed to ensure the orderly administration of justice." (*Ibid.*) If Rostack had sought leave to file a second motion for summary judgment *not* to reargue issues of intent and delivery already resolved by Judge Lavin, but to argue, for example, that Chen was not authorized to act for Rostack, the propriety of leave would turn on whether Rostack satisfied the prerequisites for a renewal of a motion set forth in Code of Civil Procedure section 1008, subdivision (b). Rostack would have to show new or different facts, circumstances, or law and "a

satisfactory explanation for the previous failure to present the allegedly new or different evidence or legal authority . . . ." (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 382-383.) From our review of Rostack's initial motion for summary judgment, it appears that Rostack was aware that Angela was asserting from the outset that Chen had acted properly on behalf of Rostack when he forgave the loan, and Rostack actually argued that Chen's alleged acts were not binding on Rostack. Rostack would therefore have to explain why it should have a second bite at this particular apple.

As we have noted, we need not address whether Rostack met this burden, because the court ultimately resolved the gift affirmative defense against Angela without considering the issue as part of Rostack's renewed motion for summary judgment. Moreover, as we now explain, if the issue had been addressed in summary judgment, we conclude – as did Judge Lavin – that triable issues of fact exist.

4. A Triable Issue of Fact Exists

Even if summary judgment procedures had been properly followed, we would conclude a triable issue of fact exists that Chen forgave the loan on behalf of Rostack. This actually encompasses two issues: (A) that Chen forgave the loan; and (B) that Chen lawfully acted on Rostack's behalf.

A. Chen Forgave the Loan

There is a triable issue of fact that Chen intended to forgive the loan and acted on the intent by in fact forgiving the loan. There is evidence that he was concerned with making equal gifts of property to his daughters and, in accordance with this, repeatedly expressed the intent to forgive the Two Bear Ranch loan.

The real dispute is over whether Chen actually delivered the gift of loan forgiveness. Civil Code section 1147 provides that "a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee," "The necessity for delivery in gifts of personal

property has its genesis in the archaic doctrine of seisin. [Citation.] But in spite of the formalistic character of its origin, the requirement has salutary features which fully justify its retention in the law. It protects the property of the individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. Such a precaution is especially desirable when, as is frequently the case, the alleged donor is dead at the time the claim is asserted. Moreover, by requiring some positive act of relinquishment such as manual tradition of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property. [Citation.] [¶] In the light of these desiderata such vague terms as 'constructive delivery', 'symbolic delivery', and 'parting with dominion and control' take on a new aspect and become more certain and explainable. Where there has been unequivocal proof of a deliberate and well-considered donative intent on the part of the donor, many courts have been inclined to overlook the technical requirements and to hold that a 'constructive' or 'symbolic' delivery is sufficient to vest title in the donee. However, where this is allowed the evidence must clearly show an intention to part presently with some substantial attribute of ownership." (*Gordon v. Barr* (1939) 13 Cal.2d 596, 601.)

"Whether there has been a delivery is a question of fact. Delivery is primarily a question of intent." (*Marshall v. Marshall* (1956) 140 Cal.App.2d 475, 479.) A note can be forgiven orally; there need not be a renunciation. (*Schiffman v. Atlas Mill Supply Inc.* (1961) 193 Cal.App.2d 847, 849-850, 852 [oral agreement that note was satisfied was sufficient].)

Angela submitted evidence in opposition to summary judgment that Chen made a delivered gift in the form of loan forgiveness on behalf of Rostack. On February 7, 2005, Angela asked Chen for the funds to pay off the loan. Instead, the next day, Chen handwrote the February 8, 2005 modification, which indicated that Angela "got" $34 million in the form of loan

forgiveness. Angela declared that, on February 8, 2005, Chen and his daughters reviewed the July 2003 chart. Angela and Vivien reminded Chen about the gifts to Angela, and Chen agreed. He made the February 8, 2005 modification to the chart, and "confirmed the gift of Two Bear Ranch loan" to Angela. According to Angela, "Vivien agreed, acknowledged and signed off on the gift." Mrs. Chen was also present at the meeting, and explained in her declaration that "[a]s far as all of us were concerned, the gift was made." Chen's activities were, by this time, limited by Alzheimer's, and his wife testified that the entire family believed that, by this writing, Chen confirmed the gift of the loan to Angela. We find it significant that, unlike the February 2005 proposal which stated Chen "had agreed to gift the loan," the modification uses the past tense ("got") indicating that the note was already forgiven, and the delivery of forgiveness completed.

B. *Chen Lawfully Acted for Rostack*

There is also a triable issue of fact that Chen lawfully acted for Rostack when he forgave the indebtedness on the corporation's behalf. When a sole shareholder is "for all practical purposes the corporation, and [is] managing its business much the same as if it were his own," the shareholder can bind the corporation. (*Taugher v. Richmond Dredging Co.* (1917) 33 Cal.App. 303, 308 [shareholder owned 1998 of 2000 shares, was also corporate president].) When "dealing with a 'one man corporation' . . . the sole owner 'may do what he will with the assets and credit of the corporation and no one but creditors may complaint.' [Citation.]" (*Fenolio v. McDonald* (1959) 171 Cal.App.2d 508, 512.)

Preliminarily, we note that the trial court misunderstood the relationship between Chen and Rostack. Rostack was owned by Sai Wo, which in turn was owned by Chen. Although Rostack relied on Nan Fung employees to perform its accounting services, Rostack was not part of the Nan Fung corporate structure. The trial court, however, mistakenly believed Sai Wo was not directly held by Chen. The trial court's tentative summary judgment

ruling included the language, "the undisputed facts before the court are that the stock of Rostack was owned by another company [Sai Wo] and that the stock of that company in turn was owned by a parent company." The tentative similarly stated that Rostack "had a parent company (corporation) and that it in turn was owned with its shares held by a separate holding company." In response to the tentative, Rostack itself suggested correcting both of those statements to state only that Rostack's stock was owned by a parent company. Despite Rostack's concession regarding its ownership, the court's final ruling contained both misstatements from its tentative and continued to incorrectly state that Sai Wo's stock was held by a holding company, not Chen. This is significant because the trial court apparently believed that, even though Rostack did not have officers and employees, it was part of a corporate structure that indisputably did. On the contrary, Angela offered evidence that Chen wholly owned Sai Wo, and Sai Wo wholly owned Rostack, and that Rostack was nothing but an entity that does Chen's bidding in connection with investments. As such, Chen could do as he wished with Rostack's assets, including the loan. In this regard, we find it significant that throughout the entire history of the loan – from the initial determination that Chen would fund the Two Bear Ranch purchase with a loan from Rostack, through Chen's oft-stated intentions to gift the loan to Angela, including the February 8, 2005 modification – Chen always acted as though he was free to dispose of the loan at his will, and nobody in the family ever suggested otherwise.

C. *Summary Judgment Should Have Been Denied*

While there is evidence that no gift occurred, Angela presented sufficient evidence to raise a triable issue of fact that, under the circumstances of Chen's illness, Chen's repeatedly-stated desire to gift the loan to Angela, and Chen's desire to resolve family gift issues, his writing that Angela "got" the value

of the note constituted symbolic delivery by Rostack at the moment he wrote it.[9]

5. Attorney's Fee Award Must Be Reversed

As we reverse the judgment in favor of Rostack, Rostack is no longer the prevailing party, and the attorney's fee award must also be reversed.

DISPOSITION

The judgment and attorney's fee award are reversed. Rostack is to pay Angela's costs on appeal. Considering the unique circumstances of this case, we exercise our discretion to direct that further proceedings be conducted before a different judicial officer. (See Code Civ. Proc., § 170.1(a)(6)(A)(iii); *In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1327.)

RUBIN, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.

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[9] On appeal, Angela argues that the trial court also erred in resolving her estoppel affirmative defense against her in summary judgment. Our review of the operative answer shows that the estoppel affirmative defense relies upon, and appears to be a restatement of, the gift defense. It states, among other things, that Chen "intended to, and did, gift Two Bear Ranch to Defendant, thereby forgiving, canceling and/or discharging" the note." It further states, "Rostack is seeking to enforce the [note] even though it is aware that Mr. Chen gifted the Two Bear Ranch loan to" Angela. Under these circumstances, our conclusion that there is a triable issue of fact as to gift applies equally to the estoppel affirmative defense.